IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID DWAYNE WATSON,
Appellant.

No. 2 CA-CR 2017-0171
Filed October 31, 2019

Appeal from the Superior Court in Pima County
No. CR20151542001
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Linley Wilson, Assistant Attorney General, Phoenix
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 David Dwayne Watson appeals from his convictions for two counts of first-degree murder and one count of second-degree murder, raising numerous issues and assignments of error. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Because the police investigation extended over a lengthy period of time, and considerable circumstantial evidence was involved both before and during trial, the relevant background requires an extensive account, some of which is deferred to sections below that address particular issues raised on appeal. We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Watson. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015).

¶3 In 1995, Watson married Linda, and, in 1996, they had a daughter, Jordynn.[1] Linda's mother, Marilyn, shortly thereafter moved to Tucson "to help take care of Jordynn." In 1998, Linda filed a petition for dissolution of marriage. The divorce proceeding was highly contentious, with Watson and Linda fighting over custody of Jordynn and "money issues." In the final divorce decree, Watson and Linda were ordered to share joint legal custody of Jordynn. In early 2000, Linda moved to modify the custody arrangement; after no agreement could be reached in mediation, a hearing was set for August 24. Watson expressed to his new wife, Rosemary, his "frustrations" with Linda, and said "she needs to go away" and she "needs to disappear."

[1]Although we generally avoid identifying crime victims by name, to avoid confusion and because the names of the victims were repeatedly disclosed over the course of not just one, but two, highly publicized trials, we refer to the victims and certain witnesses by their first names.

¶4 Days before the hearing, Linda expressed great fear of Watson to a relative and on the night of August 20, she went missing. That same night, when Rosemary came home from her evening job, Watson "appeared to be sleeping," but when she woke up later in the night, she realized he was no longer in bed. Rosemary got up and looked for Watson around the house, but did not find him and went back to sleep. She awoke again near dawn and saw Watson outside "at the back of his Jeep," "cleaning [it] out." She also observed "something with a long handle" sticking out of the vehicle, which she assumed was a "yard tool." Watson told her he had gone for a walk to "clear his head" and handed her a box of rubber gloves to put away.

¶5 The next morning, a man who had been helping Linda renovate her home arrived at her house and noticed the doors were unlocked and a broken cup in the entryway. Police investigators discovered Linda's blood on the floor of the entryway and "a fairly heavy stain" of dried blood on the cord of a vacuum cleaner. The detectives believed the vacuum cord had been lying in blood, and there was "probably more blood" that "had been cleaned up." When subsequently questioned by police investigators, Watson said he had been home throughout the night of August 20, as did Rosemary. She later admitted lying because she "was just trying to protect him" and was afraid of her family "being ripped apart at the seams."

¶6 Watson secured sole custody of Jordynn in October 2000, and in January 2001, Marilyn initiated proceedings for grandparent visitation.[2] An extended hearing on Marilyn's petition was held over the course of thirteen months, and Watson expressed "extreme[] ang[er]" over Marilyn's efforts throughout that period. In January 2003, the family court granted Marilyn's request for unsupervised visitation with Jordynn. Marilyn subsequently began expressing fear of Watson after he one night "showed up in camouflage at her house." Marilyn was "suspicious that [Watson] was hanging around at her house" and "was always concerned about him showing up whenever and doing something to her." At one point, she asked her neighbor's husband to check the bushes at her house before she returned home after a visit with Jordynn to ensure Watson was not hiding there. After experiencing repeated lack of cooperation by Watson over

[2] Around the same time, Watson's mother, Christine, also filed a petition to establish grandparent rights seeking unsupervised visitation with Jordynn.

scheduling and having visits with Jordynn, in April 2003, Marilyn filed a request to enforce the court's prior visitation orders, which was essentially granted.[3]

¶7 On May 7, 2003, after Marilyn had visitation with Jordynn, one of her friends, Renee, accompanied her and they returned Jordynn to Watson's home and left. Shortly after 8:30 p.m., Marilyn's next-door neighbor heard his dogs barking and stepped out to the front of his house. He saw Marilyn and Renee standing outside Marilyn's house having a verbal confrontation with a man who was pointing a handgun at the women. The neighbor saw "gun blasts come out of the gun," heard the gunshots, and saw the shooter run away. He then called 9-1-1. The neighbor had been unable to see the shooter's face, but provided a general description consistent with that of Watson. Watson arrived home sometime after 9:00 p.m., "white as a ghost," panicked, and sweating. He stripped his clothes off in the kitchen and told Rosemary to wash them, then took a long shower.

¶8 Marilyn and Renee were pronounced dead at the scene. Marilyn had been shot at close range in the back of her head, and Renee was shot, from a less proximate range, in the chest. Marilyn's purse was lying near the sidewalk with its contents intact, including her passport, social security card, phone, and $208 in cash. Renee's fanny pack, which she carried instead of a purse, was recovered from her nearby home containing her wallet and $300 in cash. Both Renee's and Marilyn's house keys were found at the scene on the ground, as well as Marilyn's car keys. Detectives also found several bullet casings, which forensic analysis later confirmed had all been fired from a Ruger pistol. Watson had owned a Ruger handgun but told detectives he previously had sold it, although he could not say who he sold it to. Months later in October, a skull was discovered in the desert northwest of Tucson near the Silverbell Mine, which was years later determined to be Linda's.[4]

¶9 In April 2015, Watson was charged with one count of second-degree murder for Linda's death and two counts of first-degree murder for the deaths of Marilyn and Renee. The case proceeded to trial in October

[3]The family court ordered that the Judicial Supervision Program work with the parties to ensure Marilyn received the visitation she was due.

[4]Although the skull was found in October 2003, it was not identified as Linda's until February 2011, through DNA comparison.

2016, but the trial court declared a mistrial after the jury was unable to reach a verdict. After his retrial in early 2017, Watson was convicted as charged and sentenced to sixteen years' imprisonment for the second-degree murder charge, and life imprisonment with eligibility for release after twenty-five years for each first-degree murder charge, all sentences to run consecutively. We have jurisdiction over Watson's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Evidence of Third-Party Culpability

¶10 Watson first argues the trial court violated his right to present a complete defense by precluding third-party culpability evidence. We review the trial court's ruling on this issue for abuse of discretion. *State v. Prion*, 203 Ariz. 157, ¶ 21 (2002). Rules 401 through 403 of the Arizona Rules of Evidence govern the admission of third-party culpability evidence. *State v. Machado*, 226 Ariz. 281, ¶ 16 (2011). Such evidence must first be relevant, that is, "tend to create a reasonable doubt as to the defendant's guilt." *State v. Gibson*, 202 Ariz. 321, ¶ 16 (2002) (emphasis omitted). If the evidence is relevant, it is admissible unless otherwise precluded by the federal or state constitution or by applicable statutes or rules. Ariz. R. Evid. 402. And, the trial court has discretion to exclude relevant third-party culpability evidence if its probative value is substantially outweighed by the danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403.

¶11 Before trial, the state filed a motion to preclude some of Watson's several third-party culpability defenses that were "based on pure speculation." After a hearing, the trial court disallowed evidence that "Hispanic males were seen on Curtis Road on the night of the shooting" and that Renee's "family may have been responsible" for Marilyn and Renee's deaths, finding those matters "not relevant." The court further found any probative value outweighed by "the danger of unnecessarily confusing and misleading the jury."

Hispanic Males in a Cadillac

¶12 Watson maintains the trial court abused its discretion by precluding evidence that "a suspicious Cadillac" with "three Hispanic men sitting around" was reported on Curtis Road "a quarter mile away, at approximately the time that Marilyn and Renee were shot" and the Cadillac sped off "as soon as shots were fired." He argues this evidence was relevant

because a jury could "reasonably infer that the lone shooter on foot was associated with the Cadillac, and that the Cadillac was the getaway car that picked him up after the shooting." As implicitly found by the court, however, this argument is speculative, with little evidentiary basis. There was no evidence connecting the shooter with the men in the Cadillac, and that it sped away after the sound of gunshots does not suggest that its occupants had any involvement in the shooting. Thus, even if the evidence had some minimal probative value supporting Watson's defense, the court did not abuse its discretion in precluding it on grounds that any such value would risk misdirecting the jury. *See Machado*, 226 Ariz. 281, n.2 (trial court may exclude third-party culpability evidence if probative value outweighed by danger of confusing the issues or misleading the jury).

Discord in Renee's Family

¶13 Watson also argues the trial court abused its discretion by precluding evidence of "discord" within Renee's family regarding "disagreements about inheritance and property division," as well as a "disgruntled ex-boyfriend" within Renee's family who reportedly wished the entire family dead two months before the murders. Watson, citing nothing in support, claims the evidence was "relevant to show motive for killing" Renee. But the mere possibility that others could have had such motive, without any evidence connecting them to the crime, does not tend to create a reasonable doubt as to Watson's guilt. Unlike in *Prion*, where the trial court erroneously precluded evidence that a third party not only had motive but opportunity to commit the crime and had been in close contact with the victim, 203 Ariz. 157, ¶¶ 25-26, there was no such evidence connecting the former boyfriend or anyone in Renee's family to the murders.

¶14 Moreover, while evidence that another person could have committed the charged crime may be admissible, "the trial court is not obligated to allow the defendant to offer mere suspicion or speculation regarding a class of persons." *State v. Dann*, 205 Ariz. 557, ¶ 36 (2003). Watson's argument here, again, relies on nothing more than speculation. Notably, before the first trial, the court conducted an in camera inspection of financial documents related to Renee's family. The court found "nothing there that would indicate or motivate culpability of others." Watson has not shown the court abused its discretion in precluding this argument and the related evidence. *See Machado*, 226 Ariz. 281, n.2 ("[A] defendant may not, in the guise of a third-party culpability defense, simply 'throw strands of speculation on the wall and see if any of them will stick.'" (quoting *State*

v. Machado, 224 Ariz. 343, n.11 (App. 2010))); *Prion*, 203 Ariz. 157, ¶ 21 (noting the trial court's discretion to exclude such evidence if it offers "only a possible ground of suspicion against another").

Surprise Evidence

¶15 Watson next claims the trial court erred by "allowing the [s]tate to introduce surprise evidence" of Renee's driver license, the "absence of which the [s]tate knew was a key component" of his defense that "Marilyn and Renee were victims of a robbery or some other random act of violence." In Watson's first trial, Renee's daughter, Dorothy, had testified that the morning after the shooting, her aunt gave her the fanny pack her mother carried instead of a purse and that Renee's wallet was inside it. In closing arguments, Watson had urged,

> it just doesn't make sense to me that Renee is going to leave the house without some sort of identification or something . . . . We would expect to see [her] purse or fanny pack at the scene where they were shot. It's not there. . . . We don't actually have the driver's license. I propose to you the fanny pack or purse, or whatever she carried, may have been the target . . . . We have potential theft.

¶16 In the second trial, Dorothy was again called to the stand. As in the first trial, she testified her aunt had given her Renee's fanny pack as a keepsake. During the evening recess, Watson was informed that Renee's driver license had been in Renee's wallet and in Dorothy's possession, and it was shown to Watson's counsel. Watson filed a motion the next day, complaining the "untimely disclosure . . . raises considerable red flags," and asked the trial court to preclude "any evidence of the driver's license" until Dorothy "is questioned outside the presence of the jury regarding the driver's license and the circumstances surrounding the fact that [its] purported existence was not [previously] made known."[5] The court denied the motion and ruled the state could question Dorothy about the contents

[5] The claimed disclosure violation, however, is contradicted by Dorothy's testimony during the first trial when she had described the contents of Renee's wallet as including Renee's driver license, a point the state apparently failed to convey to the trial court, which was not the same judge who presided over the first trial.

of the fanny pack, including the driver license. When Dorothy resumed her testimony, she stated that the fanny pack had contained a wallet inside and had "[a]t least $300." She was not, however, questioned about the license and did not mention it.

¶17 Watson contends the trial court abused its discretion by denying his preclusion motion without considering the factors set forth in *State v. Smith*, 140 Ariz. 355 (1984), for determining "whether and how to sanction the offering party for a discovery violation." He claims "[t]he error here is plainly not harmless[] and is highly prejudicial," because the missing driver license "was a key piece of the defense's puzzle." We reject his argument. There had been no mention of the driver license during the trial before its disclosure, and any conceivable error by the court in not precluding it was rendered harmless, if not moot, by the state not introducing any testimony about it.[6] *See State v. Morris*, 215 Ariz. 324, n.8 (2007) (appellant "cannot establish prejudice from exhibits never admitted into evidence").

Denial of Mistrial Motion

¶18 Watson raises two arguments challenging the trial court's denial of his motion for a mistrial. We review that ruling for an abuse of discretion. *State v. Hardy*, 230 Ariz. 281, ¶ 52 (2012). A mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262 (1983). In considering whether to grant a mistrial based on the presentation of evidence inappropriate for the jury's consideration, the trial court must (1) determine whether the evidence called to the jury's attention matters that it would not be justified in considering in reaching its verdict; and (2) consider, under the circumstances of the case, the probability that the evidence influenced the jurors. *State v. Lamar*, 205 Ariz. 431, ¶ 40 (2003).

[6]We likewise reject Watson's hyperbolic claim that "[h]aving tailored his defense based on the belief that the driver's license was not in existence, this surprise was nothing short of trial by ambush." As already noted, that could hardly be the case when Dorothy had testified in the first trial that Renee's wallet contained her driver license.

Exhibit 799

¶19 On the twentieth day of trial during the testimony of a detective, the state distributed to the jurors a "timeline of some of the key events" in the case that contained a reference to Watson horseback riding in the area of the Silverbell Mine on December 31, 2007, evidence that the trial court had previously precluded. Immediately upon learning the timeline contained precluded information, the court collected the copies and said, "We're going to talk about something else. And if we get you edited versions we'll do that." At the conclusion of the state's direct examination of the witness, Watson moved for a mistrial, arguing the exhibit contained "things . . . that are objectionable that we thought were redacted" including "Watson rides horse, which absolutely was precluded per what we did this morning." The court replied that the reference to the horse riding "has me a little concerned," but explained "I am convinced watching the jurors they did not see it and we've collected them in time. So the Court finds that there's no prejudice to the defendant," and denied Watson's motion.

¶20 Watson asserts "[w]hen the court precluded the evidence [of a horseback ride], she recognized the high risk of prejudice" to Watson, and when that evidence was improperly introduced, "through exhibits, testimony, and argument, the trial court abused its discretion by denying [his] motion for a mistrial." We disagree.

¶21 As noted above, in deciding whether to grant a mistrial, the court must determine whether the evidence called to the jury's attention matters it should not consider. *Lamar*, 205 Ariz. 431, ¶ 40. The trial court here expressly found the jurors had not seen the precluded reference to a horseback ride because the copies had been quickly collected. The court also evaluated whether the timeline improperly influenced the jurors and found "there's no prejudice" to Watson. *Id.* (the court considers "probability under the circumstances of the case that the [inadmissible evidence] influenced the jurors"). In light of the brief period of time the jurors possessed the timeline document and the court's being "convinced" the jurors had not seen the precluded statement,[7] we defer to its conclusion that the circumstances did not warrant a mistrial. *See State v. Koch*, 138 Ariz.

[7]Watson concedes the jury had the copies only "for several minutes" and has not challenged the trial court's finding that the jury had not yet seen the reference to the horseback ride.

99, 101 (1983) ("[T]he trial judge is always in the best position to determine whether a particular incident calls for a mistrial" because she "is able to sense the atmosphere of the trial, the manner in which the [objectionable evidence was referenced], and the possible effect it had on the jury and the trial.").

¶22 Watson further asserts the state "repeatedly argued the precluded [horseback ride] throughout the remainder of the trial and in closing arguments" and thereby "blatantly violated the court's order." But his citations to the record do not support that claim. The trial court did not preclude testimony that Watson was observed pulling a horse trailer near the Silverbell Mine and fresh horse tracks were seen around the empty trailer where he had parked. Rather, the court disallowed testimony that horse tracks had been observed in the same area on a different date, January 2, 2008 as lacking foundation. And the state's questions to another witness were not "about the claim that [Watson] went horseback riding in the Silverbell Mine area on December 31, 2007," as Watson asserts, but related to one officer's observations that Watson "had parked his horse trailer" near where the skull later identified as Linda's had been found. Finally, the state was expressly permitted to refer to the testimony about Watson parking the horse trailer in closing and argue it is "circumstantial evidence that . . . when the heat was on defendant went right out there by . . . where Linda's skull was found." *See State v. Bible*, 175 Ariz. 549, 602 (1993) ("[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions.").

Exhibit 727

¶23 Watson also argues the trial court erred in failing to order a mistrial based on the jury's exposure to Exhibit 727. Although the exhibit is not included in the record on appeal, it appears to be a demonstrative chart the prosecutor created by hand on an easel the tenth day of trial during redirect examination of Cynthia Ettinger, Christine's attorney for grandparent-visitation proceedings. The state asked Ettinger about Marilyn's request to enforce visitation filed in April 2003, and asked if the hand-written listing, based on Marilyn's filing, was "the series of visits that occur[red] following" the grant of visitation. Watson objected, asserting the exhibit "misinterprets the document." The court overruled the objection, finding the chart not inaccurate as to Marilyn's filing, although it did not accurately list all the visits. The state moved to admit the exhibit, but the court deferred the issue until the jury was excused. The court later found

the exhibit not inaccurate, but sustained Watson's objection to its admission, noting "it's misleading and prejudicial to the defendant because of that comment that was made at the end."

¶24 Because Watson did not request a mistrial on this basis, we are limited to fundamental error review. *State v. Ellison*, 213 Ariz. 116, ¶ 61 (2006) ("Absent fundamental error, a defendant cannot complain if the court fails . . . to sua sponte order a mistrial."). Fundamental error "goes to the foundation of the defendant's case, takes away a right essential to the defense, or is of such magnitude that it denied the defendant a fair trial." *State v. Escalante*, 245 Ariz. 135, ¶ 1 (2018).

¶25 Watson claims the trial court's failure to declare a mistrial was fundamental and prejudicial, arguing nonspecifically that the "quality of the improper evidence" shows the "prejudice is plainly extreme," and "the court's decision to preclude . . . [the exhibit] demonstrate[s] the prejudice to [his] fundamental right to a fair trial." We disagree and conclude, on this record, there was no such error. The chart was visible to the jury for only a short time and was not admitted into evidence. As noted above, the court's only concern was "that comment that was made at the end." But we cannot determine what the comment was, it has not been identified by Watson, and we will not speculate about the contents of anything not in the appellate record. *State v. Rivera*, 168 Ariz. 102, 103 (App. 1990). Nevertheless, we presume the contents of the exhibit support the court's decision not to take other remedial measures, including ordering—sua sponte—a mistrial. *See State v. Zuck*, 134 Ariz. 509, 513 (1982).[8]

Opening Statement and Rebuttal Evidence

¶26 Watson next raises three claims related to his assertion that "the trial court erred by precluding [him] from discussing in opening statements and introducing at trial rebuttal evidence on matters introduced by the [s]tate." Specifically, he challenges the court having limited his opening statement, sustaining the state's objection to a question about

[8]Watson also mentions this exhibit in relation to his prosecutorial misconduct allegation. But he has not demonstrated how the prosecutor's creation of the chart rose to "intentional conduct which the prosecutor kn[ew] to be improper and prejudicial," *see State v. Martinez*, 221 Ariz. 383, ¶ 36 (App. 2009), and we see no misconduct.

Rosemary's character for vindictiveness, and precluding a map he sought to admit.

Limitation of Opening Statement

¶27 Watson argues the trial court erred in restricting him from discussing two theories of his defense in opening statements. Before trial, the court had precluded bad-neighborhood and botched-robbery defenses. In his opening statement, the prosecutor argued, "You may hear talk about a bad neighborhood. This was not a robbery. This was not a carjacking. This was not gang violence. This was an assassination." Watson then argued to the court that the state opened the door to his discussing the precluded theories in his opening to the jury. The court disagreed and said "[Y]ou can't get into what I precluded so far in your opening." Watson made a record of his objection, and the court stated it "expect[ed] both sides to abide by [the previous] ruling."

¶28 The first five days of trial were spent on jury voir dire, preliminary jury instructions, opening statements, and testimony from Rosemary and Jordynn. On the sixth day of trial, after the direct examination of Marilyn's first neighbor to testify, the court reversed its previous ruling, stating it would allow evidence and argument about the nature of the neighborhood and that Marilyn and Renee could have been victims of a robbery or carjacking.

¶29 Watson argues the trial court's preclusion of these theories in his opening statement prevented him from developing his alternative defense for the jury. He correctly points out that a defendant is entitled to make an opening statement, which "affords the defense an opportunity to 'explain the defense theory of the case, to provide the jury an alternative interpretive matrix by which to evaluate the evidence, and to focus the jury's attention on the weaknesses of the government's case.'" *State v. Pedroza-Perez*, 240 Ariz. 114, ¶ 9 (2016) (quoting *Oesby v. United States*, 398 A.2d 1, 5 (D.C. 1979)).

¶30 We need not determine, however, whether the trial court erred in limiting Watson's opening statement (although related evidence would later be ruled admissible), because any error in doing so was harmless. "In deciding whether error is harmless, the question 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered

in this trial was surely unattributable to the error.'" *State v. Leteve*, 237 Ariz. 516, ¶ 25 (2015) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

¶31 We agree with the state that the trial court's ruling had no impact on Watson's overall ability to present a defense, and that the guilty verdicts were unaffected. As Watson acknowledges, opening statements are not evidence. *Pedroza-Perez*, 240 Ariz. 114, ¶ 13. Instead, evidence—upon which the verdict must be based—consists of testimony and exhibits. *See id.* The court here reconsidered its earlier ruling in time for Watson to fully question witnesses who could provide testimony to support his theories. And Watson, in fact, cross-examined two of Marilyn's neighbors and two law enforcement officers on the prevalence of crime in the neighborhood. *See Jackson v. State*, 654 S.E.2d 137, 142 (Ga. Ct. App. 2007) (limitation of defendant's opening statement harmless when counsel addressed issue during cross-examination, thereby "plac[ing] substantive evidence as opposed to mere supposition before the jury"). Additionally, Watson argued his bad neighborhood and robbery theories in his closing summation to the jury, stating "we tr[ied] to put on evidence for you of other individuals who could have done it and more likely did it. . . . We've also tried to show you that the neighborhood is garbage." He went on, "We know it's a bad neighborhood. It's basically garbage, according to [a neighbor]." Watson also argued that the neighbor who witnessed the shooting

> s[aw] the shooter bend down after all the shots are fired . . . And we do not know what he's picking up. We have no idea. We do not know if this is a botched robbery.
>
> . . . .
>
> So we don't know what this gentleman is doing, this assailant who's sitting outside of this house, if he's planning on burglarizing this house, if he was planning on burglarizing Renee's house, if he planned to lay in wait for them.

See State v. Dunn, 786 S.E.2d 174, 184-86 (W. Va. 2016) (limitation on defendant's opening statement not prejudicial when defendant testified to issue and defense counsel raised it in closing argument). Thus, we are satisfied beyond a reasonable doubt that the limitation of Watson's opening

statement did not contribute to or affect the verdicts. *See Leteve*, 237 Ariz. 516, ¶ 25.

Rosemary's Character for Vindictiveness

¶32 On the fourth day of trial, during cross-examination of Rosemary, Watson asked, "would you agree . . . if there's one person in the world that knows you well it would be Jessica Denis, right?" Rosemary answered affirmatively, then Watson asked, "[w]ould you agree with the characterization that you're a vindictive person?" Rosemary answered, "I don't think I'm vindictive." The state later filed a "motion to prevent mischaracterizations and permit contemporaneous corrections," stating "[d]efense counsel asked Rosemary about Jessica Denis calling her vindictive." The trial court declined argument on the motion but outlined the procedure for making objections in those circumstances. On the seventh day of trial, on direct examination of Jessica Denis, the state asked, "Would you disagree if somebody called [Rosemary] vindictive?" Watson did not object to the question, and Jessica answered, "I would absolutely disagree. She's not at all vindictive." The state then asked, "what makes you say . . . that she's not vindictive?" As Jessica began to respond, Watson's "relevance, speculation, nonresponsive" objection was sustained by the court.[9]

¶33 On the seventeenth day of trial, the state called Nicole Joneleit, who was a bartender at a restaurant Watson and Rosemary had frequented. The state asked about an earlier conversation she had with Watson that she later reported to detectives. On cross-examination, defense counsel asked "You would say [Rosemary's] a vindictive person?" and the state objected. At a bench conference, counsel argued the state had opened the door to this question when it previously asked Denis whether she would characterize Rosemary as a vindictive person. The state responded that it had asked that question only "in direct response to [defense counsel] mischaracterizing something Jessica . . . had said." The trial court sustained the "objection on vindictiveness" because she did not recall "it being opened to the extent [defense counsel] suggested."

¶34 Watson contends the trial court erred in sustaining the state's objection. He argues the court permitted the state to elicit "evidence from

[9]On cross-examination, however, Watson repeatedly asked Jessica about her opinion that Rosemary was not vindictive and referred to specific issues the two had experienced during their friendship.

Rosemary and her friends that she was not a vindictive person," and "[b]y denying [him] the right to pre[s]ent rebuttal evidence through Nicole . . . the court prevented [him] from presenting his complete defense." We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 7 (App. 2013).

¶35 The Arizona Rules of Evidence limit the types of character traits that are relevant to assessing a witness's credibility. Ariz. R. Evid. 404(a)(3). The credibility of a witness may be questioned to provide evidence that the witness has an untruthful character, Ariz. R. Evid. 608(a), but evidence of a witness's other character traits is not admissible to prove action in conformity with that trait, Ariz. R. Evid. 404(a)(3).

¶36 Here, the defense initially broached the topic of Rosemary's alleged character for vindictiveness, referring to Denis, who had not yet testified. The state thereafter asked Denis whether Rosemary was vindictive, and Watson did not object. Although both instances may have introduced arguably improper testimony, it was incumbent on the parties to object. That inadmissible evidence may have been admitted without objection does not mean the trial court necessarily erred. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005) ("A defendant who fails to object at trial forfeits the right to obtain appellate relief except in those rare cases" involving fundamental error.); *see also State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (argument waived where defendant does not argue unpreserved error was fundamental). And, upon the state's objection, the trial court applied Rule 608(a). Moreover, while an opposing party generally may respond when an attorney presents otherwise irrelevant matters, it was Watson who initially "opened the door," and he has not demonstrated his doing so was appropriate,[10] nor has he provided authority requiring a trial court to permit rebuttal after a proper objection. *See State v. Roberts*, 144 Ariz. 572, 575 (App. 1985) (when otherwise irrelevant evidence introduced, a party "may comment or respond with comments on the same subject, in the trial court's discretion"). Watson has not shown the court abused its discretion, and his preclusion from

[10]Although vindictiveness could arguably be evidence of bias and motive to falsify, Watson did not make that argument below, instead asserting only that it was relevant because the state opened the door. *See State v. Lopez*, 217 Ariz. 433, ¶ 4 (objection on one ground does not preserve issue on another ground, and arguments not made to the trial court waived on appeal absent fundamental error).

presenting questionable evidence did not, as he asserts, "prevent[] [him] from presenting his complete defense."

Preclusion of Map

¶37 Watson next asserts the trial court "erred in precluding [him] from introducing a map demonstrating that police had conflicting evidence" about the location where he had parked his truck on December 31, 2007. He contends the state used "unreliable" area maps to demonstrate where officers believed he parked and where he frequently went horseback riding. He now claims he was prevented from introducing "reliable evidence" to the contrary. Although Watson asserts the court "denied [his] motion to [introduce] a map . . . to rebut the [s]tate's claim," the portion of the record on which he relies does not support his contention. He further claims he "moved to introduce a GPS-generated map using the coordinates" provided by an officer "showing that the police in fact had conflicting information about where [he] had been on December 31." This assertion is likewise unsubstantiated.[11] "[W]e generally do not consider arguments that are not supported by citation to the relevant portions of the record." *State v. Tucker*, 231 Ariz. 125, ¶ 47 (App. 2012); *see also* Ariz. R. Crim. P. 31.10(a)(7) (requiring opening brief to contain "appellant's contentions with supporting reasons for each . . . and appropriate references to the portions of the record on which the appellant relies").

¶38 Additionally, to the extent the "map" Watson refers to without citation may be the "pin location" he sought to introduce on the twenty-fifth day of trial, Watson has not explained how, or even alleged, the trial court erred in precluding it for late disclosure mid-trial. *See* Ariz. R. Crim. P. 15.7(c)(1) (court may preclude evidence as sanction for untimely disclosure); *State v. Jackson*, 186 Ariz. 20, 24 (1996) ("The imposition and choice of [Rule 15.7] sanction are within the discretion of the trial court."). We conclude Watson has waived this issue on appeal. *See* Ariz. R. Crim. P.

[11]Watson cites to the transcript from the twentieth day of trial in which he told the trial court "there will be a map," but the record does not reflect he offered a map into evidence or marked one as an exhibit at that time. And whether he did so days later is unclear. We do not sift through the transcripts "like pigs, hunting for truffles" to discern a defendant's unsupported arguments. *Zeagler v. Buckley*, 223 Ariz. 37, n.6 (App. 2009) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

31.10(a)(7); *State v. Sanchez*, 200 Ariz. 163, ¶ 8 (App. 2001) (failure to develop argument as required by criminal rules waives argument).

Prosecutorial Misconduct

¶39 Watson raises numerous allegations of prosecutorial misconduct and argues the cumulative effect of such misconduct deprived him of his rights to due process and a fair trial. Prosecutorial misconduct is "intentional conduct which the prosecutor knows to be improper and prejudicial" and that "is not merely the result of legal error, negligence, mistake, or insignificant impropriety." *State v. Martinez*, 221 Ariz. 383, ¶ 36 (App. 2009) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09 (1984)). To prevail on such a claim, "a defendant must demonstrate that '(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict.'" *State v. Moody*, 208 Ariz. 424, ¶ 145 (2004) (quoting *State v. Atwood*, 171 Ariz. 576, 606 (1992)). Cumulative instances of misconduct warrant reversal when they "so permeated the trial that it probably affected the outcome and denied [the] defendant his due process right to a fair trial." *State v. Blackman*, 201 Ariz. 527, ¶ 59 (App. 2002).

¶40 "We evaluate each instance of alleged misconduct" separately, *State v. Morris*, 215 Ariz. 324, ¶ 47, and then consider the cumulative effect on the fairness of Watson's trial, *see State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998). When a defendant has objected at trial, we review allegations of misconduct for harmless error; however, when a defendant fails to raise an issue for potential action by the trial court, our review is limited to fundamental error. *State v. Martinez*, 230 Ariz. 208, ¶ 25 (2012); *State v. Edmisten*, 220 Ariz. 517, ¶ 22 (App. 2009).

Grand Jury

¶41 Watson first argues the state initiated its "pattern of misconduct" during grand jury proceedings, where he alleges the prosecutor asked leading questions, cut off grand jurors' questions, "permitted and encouraged the detective to present misleading evidence," and asked questions "containing the information he was seeking." Following the grand jury's indictment, Watson moved to remand the charges, alleging mostly the same reasons. After a hearing, the trial court denied the motion.

¶42 Watson acknowledges the proper means for addressing prosecutorial misconduct in grand jury proceedings is a special action, *see*

State v. Snelling, 225 Ariz. 182, ¶ 11 (2010), but nonetheless argues the prosecutor's alleged misconduct is relevant "because it demonstrates the pervasive nature of the [s]tate's misconduct and that it was a pattern that began at the very outset of this case." Watson does not seek any relief specifically from the claimed misconduct at the grand jury proceedings, and as the state points out, courts should not consider the cumulative error of incidents that could not have affected the jury verdict, such as those occurring outside the presence of the trial jury. *See State v. Armstrong*, 208 Ariz. 345, ¶ 60 (2004) (rejecting prosecutorial misconduct claim where "acrimonious conduct occurred outside the presence of the jury"). We accordingly do not address this claim further. *See Snelling*, 225 Ariz. 182, ¶ 11.

Opening Statement

¶43 Watson next alleges the prosecutor "improperly argued inferences and conclusions, discussed multiple pieces of inadmissible evidence to support his arguments, and vouched for the [s]tate's witnesses" in his opening statement. Watson also maintains the prosecutor repeatedly and improperly objected during the defense opening statement. Watson did not object to any of the prosecutor's statements he now complains of, and this claim is therefore waived absent fundamental and prejudicial error. *See Martinez*, 230 Ariz. 208, ¶ 25. Watson, however, has failed to allege the remarks constituted fundamental errors, and thus has not met his burden. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (argument waived where defendant does not argue unpreserved error was fundamental). And although we will not ignore fundamental error if apparent in the record, we see none here. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32 (App. 2007).

Eliciting Precluded Evidence

¶44 Watson also contends the prosecutor engaged in misconduct by referring to evidence that had been disallowed. He argues the state sought to preclude the defense "from mentioning the fact that Curtis Road was a known high-crime neighborhood and that there was a possibility that Marilyn and Renee were killed in a botched robbery," then "proceeded to argue the absence of such evidence in opening statements and through leading questions presented to the [s]tate's witnesses." Again, Watson did not object or raise this argument below, although he argued the state had opened the door to the defense eliciting evidence on the topic. But even if the prosecutor's reference in opening statement to the precluded defense,

which was only a passing one, was improper, it did not call the jury's attention to matters it would not be justified in considering when determining its verdict. *See State v. Jones*, 197 Ariz. 290, ¶ 37 (2000). As noted earlier, the trial court ultimately permitted the defense to introduce evidence and argue in support of its high-crime area, third-party culpability defense. Thus, Watson has not demonstrated the prosecutor's brief initial reference, or any others during the trial, reasonably could have affected the jury's verdict. *See Moody*, 208 Ariz. 424, ¶ 145.

Leading Questions

¶45 Watson further complains the state committed misconduct by asking leading questions on direct examination. He provides several examples, but claims "it would require reprinting significant portions of each transcript to identify each one." Watson has waived any contentions not expressly identified in his brief. Ariz. R. Crim. P. 31.10(a)(7), (c); *State v. Carver*, 160 Ariz. 167, 175 (1989). Moreover, he did not object to any of the questioning he has identified, except for one, which objection was sustained. Accordingly, we review only for fundamental error. *See Martinez*, 230 Ariz. 208, ¶ 25. However, because leading questions are permissible at the discretion of the trial court, *see* Ariz. R. Evid. 611(c), and Watson has made no convincing showing of prejudice, we find no fundamental error even if the specified questioning was leading, *see State v. Duffy*, 124 Ariz. 267, 273-74 (App. 1979).

Impugning Integrity of Defense Counsel

¶46 Watson also argues the prosecutor committed misconduct by raising "a constant stream of speaking objections" during cross-examination of Rosemary, which he alleges was "designed to discredit the attorneys and accuse the attorneys of improper conduct, while vouching for the [s]tate's star witness." The record reflects the prosecutor repeatedly made a "Rule 106" objection during Watson's questioning of Rosemary, claiming the defense was "[m]ischaracteriz[ing]" her previous statement to investigators.[12] The trial court overruled the objections, instructing, "I'm going to let him ask these questions. If you think he's misstated something or mischaracterized something under Rule 106 when he's done we're

[12]Rule 106, Ariz. R. Evid., provides that when a party introduces part of a written or recorded statement, the adverse party may require the introduction of any other part "that in fairness ought to be considered at the same time."

immediately going to let you read or have her read the entire paragraph verbatim." Although the prosecutor's continued objections may have been argumentative, Watson has not demonstrated they were improper, impugned the integrity or honesty of opposing counsel, or vouched for Rosemary. *See generally State v. Thomas*, 110 Ariz. 120, 134 (1973) (frequent objections hindered defense, but no reversible error where defendant was not "effectively prevented from presenting his case"); *State v. Shook*, 1 Ariz. App. 458, 461 (1965) (prosecutor's conduct was "[a]nnoying" but defendant was not prejudiced). Watson has not shown prosecutorial misconduct occurred on this basis. And, because we find none of the alleged instances of misconduct rising to the level of prosecutorial misconduct, *see Moody*, 208 Ariz. 424, ¶ 145, we conclude Watson has failed to establish cumulative error, *see State v. Bocharski*, 218 Ariz. 476, ¶ 75 (2008) ("Absent any finding of misconduct, there can be no cumulative effect of misconduct sufficient to permeate the entire atmosphere of the trial with unfairness.").

Sufficiency of the Evidence

¶47 Watson lastly contends the evidence was insufficient to connect him "to any of the three women's deaths." We review this issue de novo, viewing the facts in the light most favorable to upholding the jury's verdicts, to determine whether substantial evidence supports those verdicts. *State v. Cox*, 217 Ariz. 353, ¶ 22 (2007). Substantial evidence is that which a reasonable jury could accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, ¶ 24 (1999). And, there is "no distinction between the probative value of direct and circumstantial evidence." *State v. Bible*, 175 Ariz. 549, 560 n.1 (1993). On appeal, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Cox*, 214 Ariz. 518, ¶ 8 (App. 2007) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Second-Degree Murder of Linda

¶48 A person commits second-degree murder if, without premeditation, he causes the death of another either intentionally, knowing his conduct would cause death or serious injury, or by consciously disregarding a substantial and unjustifiable risk that his actions would create a grave risk of death under circumstances manifesting extreme indifference to human life. A.R.S. § 13-1104(A). Watson argues the state "produced no evidence showing how, when, or where Linda died, and

further produced no evidence connecting [him] to her disappearance or death." He focuses on the absence of his DNA in Linda's house and third-party culpability evidence related to former boyfriend JR,[13] and characterizes evidence of Watson's activities on December 31, 2007 in the area where Linda's skull had been found in 2003 as "pure guesswork." Resolving all conflicts in the evidence against Watson, however, the state presented substantial evidence sufficient to support a conclusion that Watson committed second-degree murder.

¶49 First, Watson made multiple incriminating statements, immediately before Linda's disappearance and throughout the investigation, to his wife and close friends. Those statements included "[Linda] needs to go away" and she "needs to disappear," her disappearance "couldn't have happened to a better person," Linda "was gone and nobody will ever find her" and "his job would make it easy so that no one would ever find her," "people go missing and are never found," and "I know exactly where [Linda's] at and I can show you." Moreover, a sheriff's deputy testified he had surveilled Watson's movements and observed him pulling a horse trailer near the Silverbell Mine where the skull later identified as Linda's had been found, and he saw fresh horse tracks in the dirt around Watson's parked trailer. Although GPS tracking information was not available, jurors could infer that Watson's activity there was not coincidental and that he knew where Linda's body was located.[14]

¶50 The state also presented evidence of Linda's blood throughout her home, supporting the strong inference of foul play. And Rosemary testified that Watson had not been home for portions of the night of Linda's disappearance, contrary to Watson's claims to police investigators. Then, in the early morning hours, she had seen him "at the back of his Jeep" appearing "to be cleaning [it] out," after which he had handed her a box of rubber gloves. Finally, although the state was not

[13]Linda and JR had dated for two and a half years "off and on," and Marilyn initially accused him of having harmed, kidnapped, or killed Linda, but investigation confirmed he was elsewhere the night of Linda's disappearance.

[14]Jurors were given a *Willits* instruction, allowing them to draw an adverse inference against the state for the "fail[ure] to preserve the GPS tracking data from December 2007" if they saw fit to do so.

required to prove motive, *see State v. Hunter*, 136 Ariz. 45, 50 (1983), it presented evidence that Watson and Linda had been involved in a bitter custody battle over Jordynn, which had resulted in weekly hostile confrontations, Linda had expressed great fear of Watson harming her, and she went missing only three days before the scheduled hearing on her child-custody dispute with Watson.

¶51 This circumstantial evidence, despite the absence of Linda's entire remains and the lack of Watson's DNA in Linda's home, was sufficient to permit a rational juror to conclude beyond a reasonable doubt that Watson had intentionally caused Linda's death. *See* § 13-1104(A); *State v. Hall*, 204 Ariz. 442, ¶¶ 49-55 (2003) (evidence of defendant's incriminating statements and foul play sufficient to support murder conviction despite minimal physical evidence tying defendant to crime); *Fulminante*, 193 Ariz. 485, ¶¶ 1, 2, 27 (defendant's false and inconsistent statements, "highly strained" relationship with victim, and opportunity to commit the murder sufficient to support first-degree murder conviction); *see also State v. Lalonde*, 156 Ariz. 318, 319 (App. 1987) (observing that courts have upheld murder convictions on circumstantial evidence "even where the body of the victim is never found").

First-Degree Murders of Marilyn and Renee

¶52 Watson further maintains the state "produced insufficient evidence that [he] had anything to do with the shooting of Marilyn and Renee." A person is guilty of first-degree murder if, acting with premeditation, he causes the death of another person with the intent or knowledge that he could cause the death of another person. A.R.S. § 13-1105(A)(1). Watson does not argue that a particular element of the crime was lacking, but instead primarily asserts that he "presented substantial evidence that the neighborhood was a high-crime area," and the testimony of Rosemary, the state's "star witness," was "frequently unsupported by the evidence." These arguments go to weight and credibility, but it is the role of the jury, not this court, to determine credibility of witnesses and the weight to give conflicting evidence. *State v. Williams*, 209 Ariz. 228, ¶ 6 (App. 2004).

¶53 Watson has failed to show that "upon no hypothesis whatever is there sufficient evidence to support the conclusion[s] reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316 (1987). The evidence showed that Watson had been in a lengthy dispute with Marilyn over visitation with Jordynn that made him "extremely angry," and after being awarded

visitation, Marilyn went back to court one month before her death to enforce the order against Watson. He was seen outside Marilyn's house late one night wearing camouflage clothing, and Marilyn at one point asked her neighbor to check the bushes at her house and escort her home. A monogrammed money clip bearing Watson's initials, "D.D.W." was found in Marilyn's backyard a few weeks after Marilyn and Renee's deaths. And Marilyn's valuable belongings, along with her purse and both women's car keys, were left at the scene, indicating they were not victims of robbery.

¶54 The evidence also demonstrated that Watson, contrary to his several statements to police, had the opportunity to kill Marilyn and Renee within a particular window of time. Rosemary's testimony about Watson not being home when he told police he had been there was corroborated by Jordynn. Further, Watson had, again, lied about being home all night. Indeed, he changed his explanation of where he had been several times. Moreover, Rosemary's description of Watson when he arrived home supported the inference that he had killed Marilyn and Renee; he was "sweating," "panicked," "white as a ghost," and he "stripp[ed] his clothes" off and instructed Rosemary to wash them, otherwise refusing to talk to her until after he had taken a long shower. Finally, Watson fit the general descriptions given by two eyewitnesses of the shooter at the scene and there was evidence he had owned a gun of the same type used in the murders.

Disposition

¶55 For all of the foregoing reasons, Watson's convictions and sentences are affirmed.